

BEFORE THE GOVERNOR'S OFFICE
OF THE STATE OF MONTANA

In the matter of the repeal of ARM)	NOTICE OF REPEAL AND
14.8.101, 14.8.102, 14.8.103, 14.8.104,)	ADOPTION
14.8.105, 14.8.106, 14.8.107, 14.8.108,)	
14.8.109, 14.8.110, 14.8.121, 14.8.122,)	
14.8.123, 14.8.124, 14.8.125, 14.8.126,)	
14.8.127, 14.8.128, 14.8.201, 14.8.202,)	
14.8.203, 14.8.204, 14.8.205, 14.8.206,)	
14.8.210, 14.8.211, 14.8.212, 14.8.213,)	
14.8.214, 14.8.218, 14.8.219, 14.8.220,)	
14.8.221, 14.8.225, 14.8.226, 14.8.227,)	
14.8.228, 14.8.229, 14.8.230, 14.8.301,)	
14.8.302, 14.8.303, 14.8.304, 14.8.305,)	
14.8.306, 14.8.307, 14.8.308, 14.8.309,)	
14.8.310, and 14.8.311 and the adoption))	
of New Rules I through VIII pertaining to)	
energy supply emergency rules)	

TO: All Concerned Persons

1. On January 31, 2020, the Department of Environmental Quality (department), acting on behalf of the Governor's Office, published MAR Notice No. 14-7, pertaining to the public hearing on the proposed repeal and adoption of the above-stated rules at page 136 of the 2020 Montana Administrative Register, Issue No. 2.

2. The following rules have been repealed as proposed: ARM 14.8.101, 14.8.102, 14.8.103, 14.8.104, 14.8.105, 14.8.106, 14.8.107, 14.8.108, 14.8.109, 14.8.110, 14.8.121, 14.8.122, 14.8.123, 14.8.124, 14.8.125, 14.8.126, 14.8.127, 14.8.128, 14.8.201, 14.8.202, 14.8.203, 14.8.204, 14.8.205, 14.8.206, 14.8.210, 14.8.211, 14.8.212, 14.8.213, 14.8.214, 14.8.218, 14.8.219, 14.8.220, 14.8.221, 14.8.225, 14.8.226, 14.8.227, 14.8.228, 14.8.229, 14.8.230, 14.8.301, 14.8.302, 14.8.303, 14.8.304, 14.8.305, 14.8.306, 14.8.307, 14.8.308, 14.8.309, 14.8.310, and 14.8.311.

3. The following rules have been adopted exactly as proposed: New Rule I (14.8.401), New Rule II (14.8.402), New Rule IV (14.8.406), New Rule V (14.8.407), New Rule VI (14.8.410), New Rule VII (14.8.411), and New Rule VIII (14.8.412).

4. New Rule III (14.8.405) has been adopted as proposed but with the following changes from the original proposal, stricken matter interlined and new matter underlined:

NEW RULE III (14.8.405) INFORMATION REQUIRED OF
DISTRIBUTOR (1) and (2) remain as proposed.

(3) Pursuant to 90-4-305(5), MCA, nothing in this rule requires a distributor to provide confidential information, trade secrets, or other facts of a proprietary nature.

~~(3)~~(4) The department shall inform the public about each supply alert or emergency and actions being taken to address it and actions that the public is requested or required to take.

5. The department has thoroughly considered the comments and testimony received. A summary of the comments received, and the department's responses are as follows:

COMMENT NO. 1: The proposed rules conflict with statute and would unlawfully require disclosure of confidential, trade secret, and proprietary information related to a distributor's emergency operation plans, critical infrastructure, power reserve sharing agreements, and other market agreements to which it is a party. The requirement in New Rule III that a distributor provide the department with information related to an energy supply emergency is at odds with 90-4-305(5), MCA, which states, in relevant part, "this part does not require the disclosure by a distributor of confidential information, trade secrets, or other facts of a proprietary nature."

New Rule III should be amended with the following addition, "Nothing in this rule requires a distributor to provide confidential information, trade secrets, or other facts of a proprietary nature." With the amendment noted above, New Rule VII would be unnecessary.

RESPONSE: Under the energy emergency statutes, the Governor is required to consider local, state, regional, and national energy needs and shortages when determining if a situation exists that threatens to seriously disrupt or diminish energy supplies to the extent that life, health, or property could be jeopardized, so that a supply alert or emergency declaration is appropriate, and to adopt rules to implement those provisions. Sections 90-4-308, 310(1), and 316, MCA.

Existing ARM 14.8.205 and 14.8.303 require submission of certain information by electricity distributors and certain petroleum distributors if a problem may prevent the distributor from meeting energy requirements of Montana customers. New Rule III was proposed to consolidate provisions of those two rules, which are being proposed for repeal, into one rule.

Proposed New Rule III lists broad types of information that a distributor must submit in a report if the distributor or Governor believes that an energy supply shortage exists that could lead to a supply alert or emergency, but does not specifically require submission of confidential information. The department believes that a distributor could supply information for the report that does not include confidential information.

If, however, a distributor were to believe that submission of confidential information was necessary to comply with New Rule III, its requirement for submission of information must be interpreted in context with the language of 90-4-305(5), MCA, and proposed New Rule VII(2), which does not require submission of confidential information. The department, on behalf of the Governor's office, cannot, by rule or request, require submission of information that is exempted from

submission by statute. The process described in proposed New Rule VII comports with the statute in that it does not require submission of confidential information.

If a distributor believes that information requested under proposed New Rule III is confidential, New Rule VII would provide it with options concerning submission of confidential information to the department. The distributor could decide:

1. Under New Rule VII(2)(a), not to submit information that it believes to be confidential. The distributor would be required to inform the department of the claim of confidentiality and describe the nature of the information. The description would enable the department to determine if the material is confidential. If the department disagrees with the distributor's claim of confidentiality, the material would not be in the department's control, and the department would have to sue for an order to obtain it. The information would not be disclosed unless a court determined that the information was not confidential. So, no confidential information would have to be submitted, and 90-4-305(5), MCA, would not be violated.

2. Under New Rule VII(2)(b), to submit the information with an affidavit establishing, to the department's satisfaction, the confidentiality of the information. If the department determines that the information is not confidential, the department would notify the submitter and not disclose the information for a reasonable period to give the submitter time to file a lawsuit to prevent disclosure. If the department determines that the information is confidential, it must hold the information as confidential and, upon receiving a request for disclosure, may not disclose it unless it first informs the submitter and provides a reasonable period for the submitter to obtain a court order designating the information confidential.

Because the distributor would be submitting information voluntarily under proposed New Rule VII(2)(b), 90-4-305(5), MCA, would not be violated, and the constitutional process for disclosing public information would be followed.

Reviewed by:

/s/ Raphael Graybill
RAPHAEL GRAYBILL
Rule Reviewer

BY: /s/ Patrick Holmes
PATRICK HOLMES
Natural Resource Policy Advisor
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Certified to the Secretary of State July 14, 2020.